IN THE HIGH COURT OF BOMBAY AT GOA

Criminal Revision Application No.: 4/2004

Santa Rita Gomes,
son of Luis Gomes,
Resident of House No.85,
Roinibhat, Guirdolim, Chandor. ..... Petitioner.

V/s.

State (Margao Town Police Station). ..... Respondent.

Mr. S.D. Lotlikar, Sr. Advocate with Ms. S. Naik, Advocate for the Petitioner/accused.

Mr. S.N. Sardessai, Public Prosecutor for the State/Respondent.

CORAM : N.A. BRITTO, J.

Date of Reserving Judgment :
July 2, 2004.

Date of pronouncing Judgment :
July 5, 2004.

ORAL JUDGMENT :

The petitioner herein was an accused in Criminal Case No. 197/S/99/F, who has been convicted and sentenced under Sections 279, 304-A and 427 of the I.P.C., by Judgment and Order dated 25/2/2002 and 6/3/2002, respectively by the learned Judicial Magistrate, First Class, Margao and whose conviction and sentence has been upheld by the learned Asst. Sessions Judge, Margao vide his Judgment and Order dated 16.1.2004.

2. The case of the prosecution against the accused was that on 15/4/1999 at about 8.45 hours, the accused drove a mini-bus bearing registration No.GA-02-T-4224 near about Chowgule College, Gogol, Margao in a fast speed and in a rash and negligent manner while coming from Curtorim towards Margao and lost control over the same, as a result of which, the bus went off the road, on the wrong side and dashed against Sayyed Ahmed and Smt. Conceicao Fernandes, while they were waiting at the bus stop and who suffered injuries, consequent to which they died on 15.4.1999 and 28.4.1999, respectively, and, after dashing the said Sayyed and Conceicao, the said mini-bus dashed against two gadas, causing them damage and, thereafter, fell on its left side, due to which, one Kinetic Honda scooter which was parked at that place, was trapped under the said mini-bus, got damaged and moreover, the passengers who were in the said mini-bus also sustained simple injuries.

3. At the hearing of this revision application, two points have been raised by Shri Lotlikar, the learned Senior Counsel on behalf of the petitioner/accused. Mr. Lotlikar has submitted that the accident took place on account of sudden failure of the brakes of the said mini-bus and that it was the duty of the prosecution to have examined the Investigating Officer who had investigated the case or for that matter, the Motor Vehicles Inspector who had inspected the bus to enable the accused to prove that there was sudden failure of brakes and being so,

the accused ought to have been acquitted.

4. Both the Courts below have come to the conclusion that the accused had taken the said plea of failure of the brakes, belatedly and only at the stage of recording the statement of the accused under Section 313 of the Cr.P.C. Both the Courts below have also come to the conclusion that the witness who was examined by the accused in support of the said plea was unworthy of any credit. It may be noted that the prosecution had examined, amongst others, PW.8, A.S.I. Gajanan Sutar who, upon having received a telephonic message, had reached the spot of the accident and drawn the scene of offence panchanama and the sketch and had subsequently filed a formal F.I.R. against the accused on 15.4.1999. In the said F.I.R., it was stated that the accident had taken place on account of the rash and negligent driving of the said mini-bus by the accused, which statement was repeated by PW.8, ASI Sutar in his evidence before the trial Court. Not even a suggestion was put to the said ASI Sutar that the accident had taken place on account of the failure of the brakes. In case the accused could examine one witness in support of his belated plea that the accident had taken place on account of the failure of brakes, the accused could have also examined the Investigating Officer who is claimed to have not been examined or the M.V. Inspector who might have had inspected the said mini-bus, if at all. In my opinion, the plea of failure of brakes of the said mini-bus was taken by the accused belatedly and as an

afterthought and it has been rightly rejected by both the Courts below. I find no merit in the said submission.

5. Shri Lotlikar has next submitted that the appeal filed by the accused before the Court of Sessions could not have been dealt with by the learned Asstant Sessions Judge. It is submitted that the same ought to have been heard and disposed off either by the Sessions Judge himself or by the Addl. Sessions Judge.

6. There is no dispute that the accused had filed Criminal Appeal No.20/2002 before the Court of Sessions at Margao and the learned Sessions Judge, by order dated 19.3.2002, had allotted or made over the said criminal appeal to be heard by the learned Assistant Sessions Judge (II), Margao.

7. There are two aspects which need to be considered as regards the said submission. The first is covered by a Judgment of this Court dated 5/2/04 in Criminal Revision Application No.58/2003 filed by Vasudeo Raut. This Court observed in the said revision application that the appeal was made over to the Asstant Sessions Judge by an order of the Sessions Judge which was reflected in the Roznama and that this ground regarding jurisdiction was not raised before the learned Assistant Sessions Judge and that it was raised for the first time in the said criminal revision application before this Court and since the

petitioner/accused had submitted to the jurisdiction of the learned Asst. Sessions Judge hearing the said appeal and since no prejudice was caused to the accused by hearing the said appeal by the said learned Asst. Session Judge, the objection was required to be rejected.

8. The second. This Court also held that by virtue of Section 381 of the Cr.P.C., an Assistant Sessions Judge was competent to hear the appeal assigned to him. It is contended that the said observation is *per incurium*. In my opinion, it is not. Section 9 of the Code of Criminal Procedure, 1973 ('Code', for short) provides for a Court of Session and sub-section (1) thereof provides that the State Government shall establish a Court of Session for every sessions division, and, sub-section (2) thereof provides that every Court of Session shall be presided over by a Judge, to be appointed by the High Court. Sub-section (3) of section 9 further provides that **the High Court may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in a Court of Session.** (emphasis supplied).

9. Section 10 of the Code provides for subordination of Assistant Sessions Judges and sub-section (1) thereof provides that all Assistant Sessions Judges shall be subordinate to the Sessions Judge in whose Court they exercise jurisdiction, and, sub-Section (2) thereof provides that the Sessions Judge may, from time to time, make rules consistent with this Code, as to the distribution of business among such Assistant

Sessions Judges.

10. Section 374 of the Code provides for appeals from convictions and sub-section (2) thereof provides that any person convicted on a trial held by a Sessions Judge or an Additional Sessions Judge or on a trial held by any other Court in which a sentence of imprisonment for more than seven years, has been passed against him or against any other person convicted at the same trial, may appeal to the High Court and sub-section (3) thereof provides that save as otherwise provided in sub-section (2), any person – (a) convicted on a trial held by a Metropolitan Magistrate or Assistant Sessions Judge or the Magistrate of the first class, or of the second class or (b) sentenced under Section 325, or (c) in respect of whom an order has been made or a sentence has been passed under Section 360 by any Magistrate, may appeal to the Court of Session.

11. Section 381 of the Code provides as to how appeals before the Court of Session are heard. It reads as under :

> " (1) Subject to the provisions of sub-section (2), an appeal to the Court of Sessions or Sessions Judge shall be heard by the Sessions Judge or by an Additional Sessions Judge:
>
> Provided that an appeal against a conviction on a trial held by a Magistrate of the second class may be heard and disposed of by an Assistant Sessions Judge or a Chief Judicial Magistrate.

> (2) An Additional Sessions Judge, Assistant Sessions Judge or a Chief Judicial Magistrate shall hear only such appeals as the Sessions Judge of the division may, by general or special0. order, make over to him or as the High Court may, by special order, direct him to hear."

12. As seen from Section 9 of the Code, there is a Court of Session for every sessions division which is presided over by a Sessions Judge. As seen from sub-section (3) of Section 9 of the Code, Additional and Assistant Sessions Judges are appointed to exercise jurisdiction in the Court of Session. From Section 10 of the Code, it can be seen that a Sessions Judge can, from time to time, make rules consistent with this Code, as to the distribution of business among such Assistant Sessions Judges. Needless to say, any distribution of work of the Court of Session, will depend upon the limited powers which the Assistant Sessions Judge can exercise by virtue of sub-section (3) of Section 28 of the Code. No provision of the Code has been brought to my notice which creates a bar for an assistant sessions Judge to dispose of an appeal against conviction by a J.M.F.C. As already stated, the appeal was made over to the learned Assistant Sessions Judge (II) under sub-section (2) of Section 381 of the Code by a special order of the Sessions Judge, and being so, the learned Assistant Sessions Judge was entitled to and competent to hear and dispose of the said appeal. Sub-section (1) of Section 381 of the Code is a general provision and it is subject to what is stated in sub-section (2) of Section 381 of the Code. The proviso below sub-section (1) of Section 381 of the Code only excepts or

qualifies what is stated in sub-section (1) of Section 381 by providing that an appeal against a conviction on a trial held by a Magistrate of the second class may be heard and disposed of by an Assistant Sessions Judge or a Chief Judicial Magistrate. The said proviso cannot be made to travel below sub-section (2) of Section 381 by way of exception to the said sub-section as contended. The allotment of the said appeal, to be heard by the learned Assistant Sessions Judge, Margao was, certainly, in conformity with the powers conferred on a Sessions Judge in terms of sub-section (2) of Section 10 and sub-section (2) of Section 381 of the Code and, therefore, the learned Assistant Sessions Judge was, certainly, entitled to hear and dispose off the same, he being the Judge in the Court of Sessions, to whom the said work of hearing of the said appeal was allotted. Consequently, I find no merit in this submission that the learned Assistant Sessions Judge was not competent to hear and dispose off the said appeal.

12. In view of the above, the revision deserves, and is, hereby, dismissed.

N.A. BRITTO, J.

ssm.